Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

FISHING VESSEL OWNERS & MARINE WAYS, INC.,

Petitioners,

vs.

BANK OF AMERICA, NT & SA, formerly Seattle-First National Bank, fdba Seattle First National Bank aka Seafirst Bank, PENGWIN, Official No. 586183, KONRAD S. URI & I. HELEN URI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Should a lender be able to obtain lien priority through the judicially created "renewal" doctrine whereby a preferred vessel mortgage is not given priority based on its recording date, but rather the date of an earlier recorded preferred vessel mortgage?

B. Where a lien claimant has a perfected lien on a vessel, may a lender take two separate prior debts and after the date of the lien claimants perfected lien, later combine them with a series of ever increasing loans, and by consolidating all these separate prior and subsequent debts together and calling them "renewals", may the lender thereby defeat intervening lien claimants priority?

C. Did the United States court of appeals for the Ninth Circuit err in its application of the mortgage renewal rule when decided as a question of first impression to grant renewal status to a series of mortgages where the indebtedness was not the same as the original debt, the collateral was not the same as the original security, and the parties were not the same, as required by law and in contradiction to the well established precedent of the Fifth and Eleventh Circuits?

PARTIES TO THE PROCEEDINGS

A. Bank of America NT SA, formerly Seattle-First National Bank, fdba Seattle First National Bank, aka Seafirst Bank (Plaintiff and Appellee below. Bank of America is a publicly traded entity)

B. The vessel PENGWIN (in rem Defendant below).

C. Konrad Uri and Helen Uri (Defendants below)

D. Fishing Vessel Owners Marine Ways Inc (Intervenor-Appellant below. Fishing Vessel Owners Marine Ways Inc is a closely held Washington Corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public.)

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Appendix C - Statutes, Ordinances and Regulations 46 U.S.C. § 31321 et. seq 30a

Petitioner, Fishing Vessel Owners Marine Ways, Inc., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit No. 97-36050 is reported at Bank of America, NT&SA v. Pengwin and Fishing Vessel Owners & Marine Ways, Inc., --- F.3rd --- (9th Cir. 1999) (App. A). The opinion of the district court in Bank of America, NT&SA v. Pengwin, Konrad S. Uri and I. Helen Uri, D.C. No. CV-96-01305-JCC is not published, but is attached hereto. (App. B).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 14, 1999. (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

46 U.S.C. §31321; 46 U.S.C. § 31322; 46 U.S.C. § 31325; 46 U.S.C. § 31342; 46 U.S.C. § 31343. (See App C)

STATEMENT OF THE CASE

In reforming the Ship Mortgage Act, Congress intended that the nature and extent of the obligation secured by the mortgage be plain from the face of the instrument so third parties would be on notice of the entire amount that is or may become secured by the mortgage. Now, under the judicially created doctrine of renewal, rather than an objective statutory analysis of lien priority, lenders and creditors must deal with subjective criteria "is it a renewal?" Vessel suppliers have no way of knowing. The doctrine of renewal contravenes the objective standard of the statute as well as Congress' intent and this case raises the issue of whether the doctrine of renewal retains any validity, especially following Congress' reformation of the Ship Mortgage Act.

This case also raises the fundamental question whether a lender is entitled to take multiple separate prior debts and later combine them with a series of ever increasing loans, and by consolidating all these separate prior and subsequent debts together and calling them "renewals", the lender can thereby defeat any prior lien claimants priority. The question arises in the context of the Fed. R. Civ. P. 56 motion of Bank of America NT&SA (hereinafter "Bank") for "partial" summary judgment to establish lien priority superior to Fishing Vessel Owners and Marine Ways, Inc. (hereinafter "FVO"). To establish lien priority, the Bank must establish that the multiple loans given on the vessel were renewals of a loan prior to the FVO lien. For renewal to exist the Bank must show the debt

is the same the security is the same, the parties are the same, so the junior lienor will be left in exactly the same position as if no renewal mortgage had been executed. See e.g. Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1306 (5th Cir. 1985). There must be no harm to the junior lienor. Not only were none of the elements of renewal cognizable, but the Ninth Circuit failed to recognize how allowing the lender to dramatically increase the debt and change the payout would prejudice intervening lien claimants. To allow the lender to significantly increase the debt and prevent payoff is precisely why the doctrine of renewal requires the same debt and why, until now, every decision by every other circuit has refused to recognize a mortgage renewal which purports to secure debt which is significantly greater than that outstanding at the time of renewal.

The district court had subject matter jurisdiction over Fishing Vessel Owners Complaint In Intervention pursuant to admiralty and maritime jurisdiction within the meaning of Fed. R. Civ. P. 9(h) and 46 U.S.C. § 31325. The district court's Orders confirming the sale of the vessel over objection, denying Fishing Vessel Owner's motion to compel and granting Bank of America's motion for summary judgment are final judgments, and the Ninth Circuit had jurisdiction over the subject matter of this appeal pursuant to 28 U.S.C. § 1291. To fully appreciate the significance of this case, it is essential to consider its factual underpinnings.

A. STATEMENT OF MATERIAL FACTS

This is an action to establish maritime lien claims and priorities against the vessel Pengwin. Appellant Fishing Vessel Owners (hereinafter "FVO"), is a small shipyard doing business at Fisherman's Terminal in Seattle. FVO did work on the vessel Pengwin in June of 1991 and is yet to be paid. To satisfy lien claims, on April 28, 1997, the Honorable John C. Coughenour ordered the vessel Pengwin sold by Marshall's sale. Following irregularities in the sale, FVO timely objected. The trial court confirmed the sale over FVO's objections. Bank of America NT&SA (formerly Seattle First National Bank), d/b/a Seafirst Bank, (hereinafter "Bank") moved for "Partial" Summary Judgment to establish lien priority superior to FVO. FVO responded and, on September 11, 1997, FVO moved to compel production of documents that the Bank acknowledged withholding and moved to compel answers to deposition questions that the Bank's counsel instructed the Bank's Vice-Presidents not to answer. On October 21, 1997, with no trial date or discovery cutoff in sight, the district court denied FVO's motion to compel holding, FVO had sufficient opportunity to discover information essential to defeat the Bank's motion. Regarding lien priority, the trial court found that so long as part of an original debt remains, a lender retains its priority in a series of subsequent loans notwithstanding ~~that~~ later loans are not denominated as renewals nor that they far exceed the original debt. The Court found the Bank's later mortgages nearly tripling the amount of debt which existed at the time FVO's lien arose retained their priority, and held that a new mortgage is presumed to be a

renewal even where the principal is increased. The court ruled, alternatively, since the amount of the Bank's lien seven years ago at the time FVO's lien arose exceeded the proceeds obtained at the Marshall's sale some seven years hence, FVO was not harmed; and, thus, the trial court granted the Bank's motion for summary judgment. Pursuant to Fed. R. App. P. 4(a)(1), FVO filed timely notice of appeal on November 12, 1997. The matter was argued before the Ninth Circuit on February 5, 1999 and the Court of Appeals issued their opinion on April 14, 1999.

1. FACTS CONCERNING FISHING VESSEL OWNERS LIEN PRIORITY

The Bank was foreclosing on a 1994 note and preferred vessel mortgage. FVO's lien for approximately $175,000 was perfected in June of 1991. To establish lien priority, the Bank had to establish that the various loans given on the vessel, ultimately resulting in a $2.8 million debt, were renewals of a loan prior to the FVO lien. The Bank's prior loan was a $300,000.00 loan perfected in 1990. Before that loan, the Bank also had made a loan in 1988 of $750,000.00. The 1988 loan for $735,000 called for a reduction in principal of $92,000 each year. The 1990 loan for $300,000 loan called for principal reductions of $60,000 each year. According to their terms, the amount of principal remaining at the time FVO's lien arose in June 1991 is $653,000. By their terms, the 1988 loan expired with a balloon due in November 1996 and

the 1990 loan expired in June of 1995. According to their terms, the amount of principal remaining at the time of the vessel sale in May 1997, should have been ***zero***.

The Bank purchased the vessel Pengwin at the Marshall's Sale for $575,000 yet claimed priority in all the proceeds. To prevail the Bank had to prove renewal.

After July of 1991 there were two subsequent mortgages made by the Bank. The July 1991 loan, which was recorded approximately one month after the FVO lien was perfected, had no mention that it is a renewal of a prior loan or loans. The Bank, in conjunction with the July 1991 loan, prepared a document entitled "Prior and Subsequent Liens Affidavit." The purpose of the Prior and Subsequent Liens Affidavit is to establish on July 3, 1991 (the date of the 1991 note and Preferred Vessel Mortgage) there were no prior liens or mortgages on the vessel Pengwin. The Affidavit prepared by Seattle First National Bank identified its first and second preferred vessel mortgages to SeaFirst as prior mortgages ahead of the 1991 Preferred Vessel Mortgage and note. If, in fact, the 1991 note and mortgage were intended to be a renewal or replacement, then the answer should have been "none". In fact, the subsequent mortgages after July 1991 do indicate "none" regarding prior liens. The July 1991 mortgage was different, it was treated as exactly what it was, ***a new loan***. The Bank could not provide an affidavit acknowledging the priority of its own prior loans ahead of its new loan and claim at the same time that it intended to renew the very same loans. The Bank's "refinance" trail stopped in 1991; FVO had

priority over the Bank, because its 1994 note and preferred vessel mortgage can go back no further than 1991.

The huge difference in principal between the amounts owed to the Bank prior to July 1991 and the new note and preferred vessel mortgage signed in July of 1991 were additional evidence the 1991 mortgage was a new loan and new mortgage.

REASONS FOR GRANTING THE WRIT

A. THE PETITION SHOULD BE GRANTED BECAUSE A PREFERRED VESSEL MORTGAGE SHOULD BE GIVEN PRIORITY BASED ON ITS RECORDING DATE RATHER THAN THE DATE OF AN EARLIER RECORDED PREFERRED VESSEL MORTGAGE

In the early days of the Union, the ship mortgage was not a useful financing tool since it was not a contract subject to foreclosure in admiralty. Bogart v. The John Jay, 58 U.S. (17 How.) 399, 15 L. Ed. 95 (1854). Initially, Congress enacted the Vessel Sales and Mortgage Recording Act which provided for the registration of ship mortgages; the Act provided that other maritime liens, including liens arising from repairs to the mortgaged vessel "shall not lose its priority, or be in any way affected by the provisions of this act." Act of July 29 1850, ch 27, 9 Stat. 440, codified at Revised Statutes

4192, et seq. at Section 1. For most of the history of the Union, since a ship mortgage was not a maritime contract within general maritime law and was not cognizable in admiralty, any valid maritime lien had priority over the mortgage lien. The J.E. Rumbell, 148 U.S. 1, 16, 13 S.Ct. 498, 501, 37 L. Ed. 345 (1893); Morse Drydock & Repair Co. v. S.S. Northern Star, 271 U.S. 552, 46 S.Ct. 589, 70 L.Ed.1082 (1926). Following the First World War, in an effort to attract private capital to sell the wartime fleet, Congress enacted the Ship Mortgage Act of 1920 which strove to create "a preferred mortgage which in foreclosure proceedings will have priority in the distribution of the proceeds from the sale of the mortgaged vessel over all maritime liens against the vessel except for damages arising out of tort. stevedores' and crews' wages, general average, and salvage." H.R. Rep. No. 1107, 66th Cong., 2d Sess. 31 (June 4, 1920). Congress required that preferred status was only available to a mortgage "when the mortgage is made." 46 U.S.C. § 922(a); (amended and reenacted as 46 U.S.C. § 31322(a)). In 1988, faced with a "confusing collection of individual statutes enacted over a period of nearly two centuries...[which]...are poorly organized, duplicative, often obsolete, and difficult to understand and apply", Congress sought to revise and recodify ship mortgage laws and enacted Public Law 100-710. H.R. Rep No. 100-918 at p.11, reprinted in 1988 U.S. Code Cong. & Admin News at 6108 et seq. These amendments took effect on January 1, 1989, after the Bank's initial loan of $735,000 at issue here. Congress' aim in

the legislation was threefold: to make mortgage and lien laws easier to administer, to make it less cumbersome for the maritime community to use and to make it more understandable for everyone involved. Id. The House Report is emphatic that no change from prior substantive law on lien priorities was intended except as to the mortgage attaining preferred status at the time of filing rather than at recording and endorsement. Id. at 15, 17-22; see Security Pacific Bank v. September Morn, 754 F. Supp. 813, 814 n.1 (W.D. Wash. 1990) (Congress intended no substantive change in maritime lien law).

The Statute sets out objective criteria for establishing lien priority. To be accepted and to qualify as a preferred mortgage, an instrument must identify the amount of the direct or contingent obligation that "***is or may become secured by the mortgage***." 46 U.S.C. § 31321(b)(3). In enacting the law, Congress principally intended to provide adequate notice to third parties of the nature and extent of the obligation. H.R. Rep No. 100-918 at p. 17. "One of the primary purposes of this chapter is to provide notice to third parties. If a third party can obtain adequate information on which to base a business decision, then the purpose has been met." Id. "When a mortgage secures an obligation and one or more advances or repayments may be made from time to time and the maximum outstanding under the obligation at any one time is limited to a certain amount, the amount to be recorded with respect to that obligation may be ***either the maximum amount that may be outstanding at any one time, or the total of all possible***

advances that may be made. However the filing must clearly indicate which method is being used." Id. at 18. Congress contemplated a mortgage could retain its priority and that advances could be made but only "under the commitment at the time the mortgage is recorded."

Nowhere did Congress ever intend to give carte blanche authority to the lender to dramatically increase loans, (in our case from three hundred thousand to two million eight hundred thousand) or consolidate loans, yet retain priority status under an old preferred vessel mortgage.

Yet the Federal Courts have judicially imported a doctrine of "renewal" which contradicts the objective criteria and notice provisions prerequisite to preferred status which filing and recordation are designed to provide. The renewal doctrine extends later mortgages the priority of earlier mortgages under a relation-back theory. To relieve the parties of the consequences which normally flow from release or satisfaction of the mortgage, the courts presume the parties entered the new mortgage to secure the original debt. Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1308 (5th Cir. 1985); Merchants and Marine Bank v Welles, 289 F.2d 188 (5th Cir. 1961); Barnouw vs. SS Ozark, 304 F.2d 717, 722-23 (5th Cir. 1962); Southern Reef Fisheries v. O/S Broadfire Leader, 786 F.2d 1523, 1524 (11th Cir. 1986).

Congress intended that the nature and extent of the obligation be plain from the face of the instrument so that third parties can make informed business decisions on whether to extend credit. If a mortgagor can increase or consolidate

loans and retain priority, intervening lien claimants surveying the record can never be sure of the actual amount of the obligation that is or may become secured by the mortgage, nor where there are multiple mortgages, can they tell to what extent a later mortgage renewed the prior. Rather than providing adequate notice, creditors such as FVO are set adrift to wonder "Is it a renewal or isn't it?" Cases relied on for renewal pre-date Congress' amendments. The doctrine of renewal contradicts the objective standard of the statute and the intent of Congress and should be abolished. Here, FVO made prudent inquiries and relied on the federal records as they had a right to do. More could not be expected of them. As discussed below, the Ninth Circuit has now rendered both the objective criteria of the federal statute and the doctrine of renewal meaningless by acknowledging renewal when none of the elements were present and by creating a new and previously unrecognized doctrine of partial renewal.

B. THE PETITION SHOULD BE GRANTED BECAUSE BY GRANTING PARTIAL PRIORITY AT LEAST TO THE EXTENT OF THE FACE AMOUNTS OF THE PRIOR MORTGAGES, THE NINTH CIRCUIT HAS AUTHORIZED LENDERS TO LEVERAGE THE DEBT TO PREVENT OLDER LOANS FROM EVER BEING PAID DOWN, A DEVASTATING CONSEQUENCE TO THE FISHING INDUSTRY.

The Ninth Circuit Court of Appeals acknowledged in its written decision that its decision was the first in that Circuit dealing with the issue of "renewal" of preferred vessel mortgages. The Ninth Circuit so broadly expanded the Fifth and Eleventh Circuit's doctrine of renewal, that the consequences for the entire fishing industry will prove devastating.

The renewal doctrine was first articulated in Merchants and Marine Bank v Welles, 289 F.2d 188 (5th Cir. 1961). In that case, the Court held that a new note and preferred vessel mortgage was considered to be a renewal of an older note and mortgage, giving the lender the superior lien priority of the older mortgage. The rationale of the Court was that the security was the same, the parties were the same, the debt was the same, so there was no harm to the junior lienor.

In the instant case, the lender was foreclosing on a 2.8 million dollar debt, the Vessel Pengwin was the collateral. Fishing Vessel Owners and Marine Ways Inc (FVO) is a small shipyard in Seattle, Washington. FVO had a maritime lien under 46 U.S.C. §31342 a lien that was clearly prior in time to the lender's preferred vessel mortgage. The lender claimed it's debt was a "renewal" of two prior mortgages, one for $735,000.00, the other for $300,000.00. Additional facts that were before the trial court were that the 2.8 million dollar debt had other additional collateral, a different vessel, and different parties, since the other vessel (Isafjord) did not have the same owners.

In affirming that the lender had lien priority over FVO,

the Ninth Circuit Court of Appeals created a new doctrine of law, best described as "partial renewal". The Ninth Circuit provided that the lender would have priority at least to the extent of the face amounts of the older mortgages. The impact of that doctrine on the fishing industry is enormous.

Under this new doctrine a lender can (and did in the instant case) lend large sums of money to a boat owner until the boat is so leveraged it will never be able to pay of the obligation to the lender. The lender, applying all of the income to interest on the new loans, never allows the older loans to be paid according to their terms, ultimately resulting in a foreclosure.

The fishing industry generally relies on credit. Ship repairs, supplies, and gear are typically provided on credit, based on the vessel's ability to produce income in the next fishing season. If a lender wishes to leverage a boat to an extreme level, they can certainly do so, but the lender should not be granted lien priority based on older mortgages that are a fraction of the total amount of the indebtedness. The Ninth Circuit's decision of partial lien priority will prove insidious in the industry, because the only remedy available to shipyards and small marine suppliers is to bid and pay cash on the vessel sale an amount equal to the older mortgages and the amount owed to the shipyard. While a few hundred thousand dollars is not significant to the lender, it is impossible for a shipyard to raise or commit those amounts of funds on vessels that are under foreclosure.

It is the belief that if the Ninth Circuit decision stands,

small maritime businesses will not be in a position to extend credit to the detriment of the vessel owners, and severely compromising the ability of a shipyard, such as FVO, to do business at all in the industry.

C. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUIT RULINGS ON THE ESSENTIAL ELEMENTS OF THE MORTGAGE RENEWAL RULE; THE NINTH CIRCUIT ERRED IN ITS APPLICATION OF THE RULE WHEN IT DECIDED TO GRANT PRIORITY STATUS TO A SERIES OF MORTGAGES WHERE THE DEBT, THE COLLATERAL SECURING IT AND THE PARTIES WERE NOT THE SAME AS THOSE WHICH EXISTED AT THE TIME THE ORIGINAL LOAN WAS MADE .

In a devastating departure from the Fifth and Eleventh Circuit's established doctrine of renewal, the Ninth Circuit in a case of first impression found that a debt ultimately totaling 2.8 million dollars, was a renewal of several prior mortgages, where the debt outstanding at the time FVO's lien arose was only one third of this amount. The debt was not the same; the security was not the same (the loan was secured by another vessel); and the parties were not the same (the other vessel had different owners). Not only were none of the elements of

renewal cognizable, but, the Ninth Circuit failed to recognize how allowing the lender to dramatically increase the debt and change the payout would prejudice intervening lien claimants. If a mortgage renewal purports to secure an indebtedness greater than that outstanding at the time of the renewal, the interests of intervening lien claimants are prejudiced precisely because the principal of the old debt now goes unpaid and the intermediate creditors who would have been paid now get nothing.

> "While these points have force and might well lead to a different result in a different case, we do not see how they can make any difference in this case since the outstanding principal amount of the June 1988 and September 1990 mortgages substantially exceeded the proceeds from the sale of the vessel. ***Whatever the import of increasing the debt or changing the payout, the fact remains that the old debt was still unpaid and,*** like the lien claimants in Southern Reef Fisheries, 786 F.2d at 1525, Barnouw, 304 F.2d at 723, and CIT Corp. v. M/V Winchester, 643 F.Supp. 1059, 1064 (E.D. Va. 1986), ***FVO would not have had priority in these proceeds in any event.***"

(App. A; Opinion at 3419-20).

The Court held because the prior debt was not paid down FVO was not prejudiced. However the court neglected the very fact that by allowing the lender to increase the debt and change the payout, the lender is able to ***prevent the old debt from ever being paid down and therefore prevent***

intermediate creditors from ever being paid. This is precisely why the doctrine of renewal requires the same debt and why, until now, every decision by every other circuit has refused to recognize a mortgage renewal which purports to secure debt which is significantly greater than that outstanding at the time of renewal.

Central to each prior decision granting priority to the party claiming renewal is the fact that the intervening lien claimants must be left in exactly the same position as they would have been if no renewal mortgages been executed. Compare Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1305-09 (5th Cir. 1985). Avondale collected and summarized prior maritime cases on this issue and explained that their prior decisions including Barnouw expressly left undecided the issue of the treatment to be afforded a mortgage renewal which since it purports to secure an indebtedness ***greater than that outstanding at the time of the renewal, or for some other reason prejudices the interests of the intervening claim***. Id. at 1306 (emphasis supplied).

A central premise of the Banks argument is that each new indebtedness is a "renewal" and it is thus entitled to priority notwithstanding the fact the mortgage "renewals" it claims purport to secure an indebtedness far ***greater than that outstanding at the time of the renewal***. The Bank's assertion is as directly contradictory to any factual determination of renewal as it is contrary to a legal or equitable determination they are entitled to priority. Thus, summary judgment was manifestly improper.

The court erred by affirming renewal where the debt, collateral and parties were not the same. In essence, the Ninth Circuit has rendered the doctrine of renewal nugatory. Further, by affirming renewal in the face of a debt which tripled the original, the court has created a dangerous departure from the doctrine which authorizes lenders to leverage the debt to prevent other creditors from being paid.

1. BY ALLOWING CONSOLIDATION AND INCREASE IN DEBT, THE NINTH CIRCUIT GRANTED PRIORITY IN EXCESS OF THE ORIGINAL DEBT REMAINING AT THE TIME OF THE SUBSEQUENT RENEWAL.

For a renewal to exist, the law requires that there be the same indebtedness, the same security, and the same parties. Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1306 (5th Cir. 1985).

In affirming the district court, the Ninth Circuit created two new doctrines regarding renewals that simply do not exist in Federal or State law. The district court held first, that the Bank could consolidate the 1988 mortgage, and the 1990 mortgage and then give priority back to 1988. (App B). Secondly the district court ruled that since the Bank bid only $575,000.00 at the time of the sale, and that the consolidated amounts of the loans in existence at the time of the FVO lien exceeded that amount, the Court considered that amount a

renewal. (App B). No case in existence suggests partial priority of a mortgage based on the renewal doctrine. The Courts have always held that a new preferred vessel mortgage is either a renewal, or it is not a renewal. There is no doctrine of partial renewal.

Neither the renewal doctrine relied on by the Bank, nor the objective standard Congress set out in the maritime lien statute was ever intended to give carte blanche authority to the lender to dramatically increase loans, (in our case from three hundred thousand to two million eight hundred thousand) or consolidate loans, yet retain priority status under an old preferred vessel mortgage.

A. The Bank Could not Rely on the Doctrine of Renewal to Obtain Lien Priority over FVO's Lien.

The Bank relied in its motion for summary judgement on Merchants and Marine Bank vs. Welles, 289 F.2d 188 (1961). That case held that a new note and preferred vessel mortgage was considered to be a renewal and the mortgage holder retained its lien status. Id. at 194. The court explained that in attributing to the renewal mortgage, the priority of the initial mortgage, the junior lienor is left in "exactly the same position" as they had been if no renewal mortgage had been executed. Id. (emphasis supplied). Consequently, there was no harm to the junior lienor. Id. In examining the facts of their case, the Court articulated "the security was the same,

the parties were the same, the debt was substantially the same." Id. at 193. In that case the original note was for $12,000.00, the renewal note was for $11,500.00.

In other cases in which the new mortgage is considered a renewal, the Courts have consistently determined that the original loan and the renewal loan are substantially the same. In Avondale Shipyards vs. Tank Barge, 754 F.2d 1300, 1306-08 (5th Cir. 1985), the renewal amount was a refinance of the remaining balance on the original note and Preferred Vessel Mortgage. In Barnouw vs. SS Ozark, 304 F.2d 717, 722-23 (5th Cir. 1962) the principal balance was substantially the same. In that case there was a small increase in the principal balance to offset the debtor being given a lower interest rate. Id. In other words, the debtor paid a point on the loan in order to buy down the interest rate. The court noted that was a common financing transaction and observed that the principal balance was substantially the same as that of the original debt. Id.

Whether you look at the original principal balance of the 1988 note ($735,000.00) the remaining principal balance as of July 1991 on that note ($459,000.00), or the $300,000.00 note and mortgage recorded in September, 1990, the fact of the matter is that the July 1991 note for $1,400,000.00 ***could not conceivably be considered to be,*** in the words of the Merchants and Marine Bank decision, ***"substantially the same" as the original debt***. Merchants and Marine, supra 289 F.2d at 193. That the Bank's Complaint was ultimately for $2,800,000.00, many times the original

indebtedness, that the loan was secured by different collateral (the bank cross-collateralized the loan with another vessel) and different parties (the vessel was owned by another corporation) makes FVO's argument that the court erred in granting renewal all the stronger.

2. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT DECISION CONFLICTS WITH THE CONSISTENT DETERMINATION OF OTHER FEDERAL COURTS THAT UNDERCAPITALIZATION PREVENTS TREATMENT OF A NEW MORTGAGE AS A RENEWAL

In opposition to the Bank's motion for summary judgement, FVO also argued that there were further compelling equitable arguments that support FVO's position. Going back to the case of Merchants and Marine Bank vs. Welles, 289 F.2d 188 (1961), the Court enunciated the rule that given the equivalent principal balance, security, and parties, the Court would treat a new mortgage as simply a renewal, it indicates that it would only do so "in the absence of paramount equities." The Federal courts have consistently held that in examining inequitable conduct by a preferred vessel mortgage holder, the courts will consider under-capitalization as precluding treatment of a new note and preferred vessel mortgage as a renewal. 2 Benedicts on

Admiralty, Chapter 6 § 70G (1994). The Bank has filed affidavits in this case maintaining that the sale price of the vessel and fishing rights ($575,000.00) is a proper figure. When the Bank dramatically increases a loan in the amount of $735,000.00 to a debt obligation of $2,800,000.00 on a boat they affirm is only worth $575,000, no sufficient equity or capital exist to cover the obligations imposed upon this vessel. Granting renewal under such circumstances is plain error.

B. The Mortgage Prior to The FVO Lien Was For Only $300,000.00

The Trial Court ruled that the Bank obtained priority in part because the amount of the Bank's bid at the foreclosure sale was less than the amount owed the Bank at the time FVO's lien was in place. (App. B). However, the fact that the Bank loan prior the FVO loan was for only $300,000.00 defeats the trial Court's analysis.

The Bank's theory on their Motion for Summary Judgment was that each note executed in favor of the Bank and each preferred vessel mortgage was merely a renewal of the previous note and mortgage. In the Bank's original complaint they failed to even mention the fact that in September of 1990, a $300,000.00 note and mortgage was executed in favor of the Bank. After that issue was raised by FVO, the Plaintiff amended their complaint to include the $300,000.00 mortgage.

The Bank's theory that each note was a renewal of the

previous is difficult to understand if there is a May, 1988 $735,000.00 note, then a September, 1990 $300,000.00 note, then in July, 1991 $1,400,000.00 note. Under the Bank's theory, the $300,000.00 note would have been a renewal of the $735,000.00 note, and then in July of 1991, the $1,400,000.00 note was a renewal of the $300,000.00 note, making the difference in principal even more disparate than originally contemplated.

Although it acknowledged FVO's arguments that the Bank is not entitled to renewal since the collateral was difference (in addition to the PENGWIN the bank added the ISAFJORD as security for the later increased loan amounts), the debt was not substantially the same, the Ninth Circuit failed to see what difference it made to allow renewal or consolidation of the loans since the outstanding principal amount substantially exceeded the proceeds from the sale and thus the court concluded FVO would not have had priority in the proceeds anyhow. (App. A, Opinion at 3419-20). First it makes all the difference in the world; and second, the court's conclusion is incorrect. If a lender is allowed to entirely rearrange the amount, collateral securing the loan, the parties and the payout, then renewal means nothing. Second, absent consolidation and renewal, the prior loans would be treated as separate obligations and, by their terms, would have been paid off years earlier.

Facially, the September 1990 $300,000 debt is not a renewal; and the July 1991 debt of $1.4 million cannot be a renewal of the $300,000 debt. After 1990, no amount in

excess of $300,000 could be a renewal. The September 1990 note for $300,000 states on its face:

> "LINE OF CREDIT: This loan is a straight line of credit. Once the total amount of principal has been advanced, Borrower is not entitled to further loan advances."

This evidence controverts the Bank's assertion of intent to renew as well as assertions regarding payoff figures for the loans.

Every renewal case cited by the Bank in its motion for summary judgement involves renewal of the prior note and preferred vessel mortgage. There is no case in existence, to FVO's knowledge, that suggests the Bank may obtain renewal status on everything that is owed to it at any time on any note; nor are there cases that suggest the Bank can consolidate all its loans under one refinance, and then get lien priority based on the oldest preferred vessel mortgage. At best, the Bank can try to claim the July 1991 mortgage was a refinance of the prior mortgage, which is the $300,000.00 mortgage obligation. To do so, defeats even the Trial Court's interpretation of the renewal doctrine, since now the sale price of the vessel $575,000.00 exceeds the prior mortgage $300,000.00.

Even assuming the truth of the Bank's argument, they cannot show renewal. The Bank's Vice President asserts that "[T]he balance on the promissory notes of May 19, 1988 and September 6, 1990 was paid down to $745,144.77 before additional credit was extended to Pengwin, Inc. on June 19,

1991. This was the lowest balance for the two notes at any time"

If true, then as of June 1991, no loan amount substantially in excess of $745,144.77 can be considered a renewal. On June 19, 1991 the Bank extended additional credit in the amount of $1.4 million, twice the balance remaining on the prior debt. Putting aside the fact that the Bank withheld significant portions of its loan file and FVO brought a motion to compel, there is nonetheless no need to adduce any additional evidence regarding the Bank's calculation of the pre-July 1991 debt since as a matter of law a loan of 1.4 million is not a "renewal" of a $745,000 debt.

Even assuming the truth of the Court's opinion that all they are doing is granting the Bank priority only to the extent of the balance outstanding when FVO perfected it lien, the court's assertion that FVO is not harmed by granting such partial priority is fallacious since the Court's opinion rests on the premise that between June of 1991 and the time the Bank foreclosed in August 1996 , a period of over five years, would not be paid down.

The loan purporting to renew the $745,144.77 balance outstanding when FVO perfected it lien called for semi-annual reductions in principal of $87,500.00 beginning January 1, 1992. By the time the Bank foreclosed in 1996, ten payments totaling $875,000.00 were called for and subsequent "renewals" called for even greater reductions in principal. If, in fact, the court only granted partial priority to the extent of the 1991 $745,144.77 balance outstanding when FVO

perfected it lien, then FVO is entitled to every last dime from the sale since the prior debt would have been completely paid off by the time of the sale. To find such "partial" renewal in the face of ever increasing debt and ignore the prejudice that accrues, is in direct conflict with prior federal law and renders the doctrine of renewal a dead letter.

CONCLUSION

This case presents a question of exceptional importance. The Bank obtained fishing rights and a vessel worth millions of dollars for a credit bid of only $575,000.00. From the proceeds of the sale FVO will receive nothing. The trial court ruled FVO receives nothing because the two million eight hundred thousand mortgage the Bank was foreclosing on was a "renewal" of two existing loans which had a principal balance of approximately $745,000.00 at the time of FVO's lien. The Court reached that result by consolidating the two loans and giving partial priority up to the amount of the debt existing at the time of FVO's lien, despite there being no case law or statute which creates those rules. Lenders must not be permitted to consolidate all prior and subsequent debts and by calling them "renewals" defeat any prior lien claimants priority. Each of the Trial Court's rulings about lien priority, and the Ninth Circuit's ruling are contrary to the well established case law, and should be reversed. Accordingly, Fishing Vessel Owners Marine Ways, Inc. respectfully requests this Court to grant its petition for a writ of certiorari.

Respectfully submitted

/s/_____

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